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Paper No. 30
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Labatt Brewing Company Limited
v.
Northampton Brewing Corp.

Opposition No. 104,770
to application Serial No. 75/003,025
filed on October 10, 1995

Helen Hill Minsker of Banner & Witcoff, Ltd. for Labatt
Brewing Company Limited.

Charles A. Wilkinson for Northampton Brewing Corp.

Before Seeherman, Walters and Bucher, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Labatt Brewing Company Limited, a corporation of Canada, has opposed the application of Northampton Brewing Corp. of Pennsylvania to register "TRU BLU BEER & ALE" as a trademark for "malt beverages, specifically beer and ale."¹ As grounds for opposition, opposer alleges that it has long used marks containing the word "BLUE" in connection with beer, and that applicant's mark so resembles opposer's registered trademarks "LABATT BLUE,"² "BLUE LIGHT" (with the word "Light"

¹ Application Serial No. 75/003,025, filed October 10, 1995, asserting a *bona fide* intent to use the mark in commerce.

² Reg. No. 1,098,297, issued on August 1, 1978; §8 affidavit accepted and §15 affidavit received; renewed in 1998.

disclaimed),³ and "BIG BLUE"⁴ as to be likely, when used in connection with applicant's products, to cause confusion, to cause mistake or to deceive.

In its answer applicant has denied the salient allegations of the notice of opposition.

The record includes the pleadings; the file of the opposed application; the testimony deposition, with exhibits, of opposer's witness, David van Wees, Director of Marketing; and the testimony deposition, with exhibits, of opposer's witness, Bernard Beasley, Director of Intellectual Property. In addition, opposer has submitted, under a notice of reliance, status and title copies of its three pleaded registrations as identified above, applicant's responses to selected interrogatories and the exhibits thereto, and applicant's responses to opposer's requests for admission and the exhibits thereto. In addition, applicant has submitted, under a notice of reliance, opposer's responses to applicant's interrogatories and related documents produced during discovery, and applicant's responses to opposer's interrogatories⁵ with enclosures and exhibits, including a

³ Reg. No. 1,350,920, issued on July 23, 1985; §8 affidavit accepted & §15 affidavit received.

⁴ Reg. No. 1,563,650, issued on October 31, 1989; §8 affidavit accepted and §15 affidavit received; renewed in 1999.

⁵ Applicant contends in its Notice of Reliance that pursuant to Rule 2.120(j)(5), its own answers to opposer's interrogatories should be made part of the record because fewer than all of the answers to interrogatories were offered into evidence by opposer. Hence, applicant introduced under its notice of reliance four other answers to interrogatories which it argues should in

dozen different trademark listings derived from a variety of trademark searches. Under a rebuttal notice of reliance, opposer submitted certified histories of four of its registrations.⁶ Under a supplemental notice of reliance, opposer submitted a copy of an article taken from The Washington Post of September 3, 1999.

Only the opposer has filed a brief in this case and an oral hearing was not requested.

The record shows that Labatt Brewing Company Limited, the opposer herein, is a Canadian manufacturer of beer, and that it has been distributing beer in the United States for more than thirty years. Opposer has marketed beer in the United States under the mark "LABATT BLUE" since July 1972, under the mark "BLUE LIGHT" since November 1983, and under the mark "BIG BLUE" since 1994. Opposer's witness Bernard Beasley testified that opposer's three marks containing the word "BLUE" have been used continuously in the United States in connection with beer since their respective introductions.

fairness be considered so as to make not misleading what was offered by opposer. Applicant's notice of reliance is supported by a written statement that it needs to rely upon these additional discovery responses because they support applicant's *bona fide* intent to use a trademark which it believes is not likely to be confused with other trademarks. Accordingly, we have considered these additional responses and the exhibits attached thereto.

⁶ Opposer's Rebuttal Notice of Reliance, exhibits 1 - 4, comprised certified copies of four registrations and the file wrappers of the respective applications. "LABATT'S" (Reg. No. 1,313,759); "LABATT'S" (stylized) (Reg. No. 1,357,076); "50" (Reg. No. 939,002); and "EXTRA STOCK" (Reg. No. 1,766,109).

Opposer's beer products sold in the United States under the marks "LABATT BLUE," "BLUE LIGHT," and "BIG BLUE" are marketed through opposer's U.S. subsidiary, Labatt U.S.A. Inc., which in turn markets opposer's beer products through wholesale distributors. According to the trial testimony of opposer's witnesses and the accompanying records, opposer's "LABATT BLUE," "BLUE LIGHT," and "BIG BLUE" beer can be found in stores and in bars throughout the United States, although Michigan and upstate New York make up its two top markets. At retail stores, a six-pack of "LABATT BLUE" beer sells for between four and nine dollars.

According to the trial testimony of opposer's witnesses and the accompanying exhibits, the combined volume of Labatt's beer sold under these three pleaded marks: "LABATT BLUE," "BLUE LIGHT," and "BIG BLUE," represents the largest volume of Canadian beer imported into the United States from a single Canadian brewer.

Opposer advertises its Labatt beer products sold in the United States under the marks "LABATT BLUE," "BLUE LIGHT," and "BIG BLUE" through media such as television, radio, billboards and local print media, and also through point of sale promotions. The record is replete with examples of opposer's promotional materials for all three marks, including videotapes of television advertisements, photographs of point of sale displays, full-page

advertisements from glossy magazines distributed within the United States, publicity packets provided to U.S. distributors containing glossy pull-outs promoting beverage products and other merchandise, and examples of outdoor and transit advertisements.

Applicant's responses to opposer's interrogatories show that applicant is seeking to establish a brew pub under the name Northampton Brewing Corp. and revive the rights to TRU BLU BEER & ALE - a product produced a hundred years ago in the Commonwealth of Pennsylvania and marketed at that time throughout the northeastern United States by an earlier entity known as Northampton Brewing Corp. At the time of trial, applicant had not yet made use of the mark in commerce.

Priority is not in issue in view of opposer's pleaded registrations, which are of record. King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Furthermore, the record shows that Labatt has used its marks "LABATT BLUE," "BLUE LIGHT," and "BIG BLUE" on beer prior to the filing date of applicant's application, which in the absence of any evidence of use, is the earliest date on which applicant may rely.

We turn next to a consideration of the issue of likelihood of confusion. Our determination is based upon an analysis of all of the probative facts in evidence that are

relevant to the factors set forth in In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Having reviewed all of the evidence in light of the du Pont factors, we find that confusion is likely.

Applicant's identified beer is legally identical to opposer's beer as identified in the registrations, and applicant's ale is closely related thereto. Because there is no limitation as to the channels of trade or the goods as identified in either applicant's application or opposer's registrations, we must assume that the parties' beer will be sold in the same channels of trade, which would include the sale of beer in stores, bars and restaurants, and to the same classes of purchasers. See Canadian Imperial Bank of Commerce v. Wells Fargo Bank, NA, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods recited in applicant's application vis-à-vis the goods and/or services recited in an opposer's registration). Moreover, when considering a related du Pont factor (i.e., conditions under which and buyers to whom sales are made), the evidence shows that beer generally is fairly inexpensive. Because of that, we conclude that these purchases would not be the subject of a great deal of thought or analysis.

Applicant asserted in its answer, in the form of an "affirmative defense," that its beer is microbrewed and that purchasers of its brewpub beer or micro-brew beer product would be sophisticated connoisseurs. Aside from the fact that defendant has not proven this claim, its identification of goods is not limited to brewpub beers or micro-brewed beers. Rather, it encompasses all beers and hence, all purchasers of beers.

We now turn to a consideration of the parties' marks, keeping in mind that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

In considering opposer's marks, we note that the evidence demonstrates that in Canada and in the United States, opposer's house mark is "LABATT" or "LABATT'S." Because "LABATT" is used and is perceived as opposer's house mark, the word "BLUE" in opposer's mark "LABATT BLUE" stands as the product mark and hence carries a strong, separate commercial impression. As used on packaging, labels and promotional materials, the composite mark is always displayed with the word "BLUE" shown in bold lettering much more prominent than the lettering of the house mark, "LABATT," as shown in the following image:



Furthermore, the brilliant blue trade-dress of opposer's labels, cans and six-pack carriers also reinforces the "Blue" color connotation of opposer's "LABATT BLUE" mark. The record shows that substantially all of the advertising images emphasize the "BLUE" portions of opposer's marks with the use of a dramatic blue color. The advertising copy uses phrases such as "Blue Heaven," "Summertime Blue," "True Blue Taste of Canada," "...brewed from Canada's purest blue waters...", and "Labatt's Blue - the Color of Canada."

As for opposer's "BLUE LIGHT" mark, although one interpretation for this mark might be that of 'a light that is blue,' the word "Light" as applied to beer has a well-known descriptive, or even generic, significance - a fact that is acknowledged by the disclaimer of this term. Accordingly, the word "BLUE" would be perceived as the most prominent source-indicating feature of this second pleaded composite mark.

Finally, the record shows that "BIG BLUE" is the "LABATT BLUE" formulation marketed in a large, 750 ml. can. Hence, consumers would perceive the word "Big" as a laudatory reference to the large container in which the beer is marketed. Consequently, we find that the word "BLUE" is the most prominent element of each of these three pleaded marks.

In considering the issue of likelihood of confusion, an important factor in our decision is the strength of opposer's marks. As noted above, opposer is the largest Canadian importer of beer into the United States, and the combined sales of "LABATT BLUE," "BLUE LIGHT," and "BIG BLUE" place opposer's beers in the top tier of all beers imported into the United States. While the sales and promotion figures have been held confidential,⁷ we conclude that opposer has adequately demonstrated that "LABATT BLUE" is a well-known mark within the United States.

Moreover, the record demonstrates that opposer has built and maintains a substantial merchandising program in the United States as part of its marketing efforts. Hence, "LABATT BLUE" has been used by opposer on a wide variety of collateral goods including an array of clothing items,

⁷ Consistent with Trademark Rules §2.27(e) and §2.125(e), the stipulated protective order for confidential information executed by the parties during October 1997 was acknowledged and entered by the Board on November 19, 1997. Confidential, commercial information contained in testimony and related exhibits was filed under seal, and confidential portions of subsequent filings have been kept confidential under the provisions of this stipulated agreement.

chairs, banners, mirrors, ash-trays and bar supplies, as well as a growing inventory of equipment and gear to outfit one for camping, sporting and other outdoor activities.

It is clear that when spoken, the BLUE in opposer's marks and the BLU in applicant's mark sound identical and both connote the color "blue." Similarly, TRU sounds like, and connotes, "true," meaning "authentic." The designation "TRU BLU" is the phonetic equivalent of "TRUE BLUE." The evidence of record demonstrates that patrons in bars and restaurants call for opposer's beer as "Blue," and that opposer has occasionally used the phrase "TRUE BLUE" in various advertising campaigns conducted within the United States over the years. Thus, although applicant's TRU BLU might otherwise have the connotation of "loyal," we agree with opposer that in this context, the "TRU BLU" portion of applicant's mark is likely to be construed as connoting the "authentic BLUE."

As to appearance, although there are obvious dissimilarities between applicant's mark and opposer's marks, in each mark, BLUE or its phonetic equivalent is used as a noun and refers to the color blue. Moreover, we have seen that the phrase "Beer & Ale" in applicant's mark is generic, the word "Labatt" is opposer's house mark, the word "Light" is highly descriptive in the context of beer, and the word "Big" suggests a large beer can. Hence, the BLUE or BLU

portion of each of opposer's marks creates a strong separate impression, while as indicated previously, a connotation of applicant's mark is that of "genuine" BLU beer. As such, the commercial impression of both parties' marks considered in their entireties is of various BLUE beers.⁸ Thus, we find the overall commercial impression of the parties marks are sufficiently similar that when used or registered for the same goods, confusion as to source or sponsorship is likely.

We are not persuaded otherwise by applicant's evidence, placed into the record by its notice of reliance upon specific interrogatories and documents related thereto of third-party registrations (listed on the federal and various state registers) for marks that contain the word "BLUE" for beer products. While third-party registrations, of course, are not evidence of actual usage of these listed marks in the marketplace, such registrations may be probative of the strength or weakness of a term or its connotation in connection with certain goods. However, it is clear from the listing of third-party registered marks containing the word "Blue" that the overall commercial impressions of these marks are quite different from each other and from the marks in

⁸ From the notice of opposition to its final brief, opposer refers repeatedly to its "BLUE marks" and "BLUE beer products." Yet nowhere does opposer plead a family of marks. Accordingly, we point out that in reaching a result herein favorable to opposer, our decision is based upon separate analyses of each of the three pleaded trademarks, and is not based in any way on a claim of a "family of marks."

this case. Within many of these marks, the word "blue" is used as an adjective modifying a noun (e.g., "Blue Hen"), as an adjective modifying a noun within a well-known expression applied in a fanciful or arbitrary manner to beer (e.g., "Blue Moon," "Blue Ribbon," or "Blue Note"), or in a variety of distinct noun forms along with other nouns (e.g., "Red, White and Blue," "Blues Beer," etc.).

In conclusion, we find that with respect to the specific marks opposer has pleaded herein for its beer products, opposer has shown a likelihood of confusion as to source or sponsorship between opposer's three pleaded marks and applicant's mark, "TRU BLU BEER & ALE," for "malt beverages, specifically beer and ale."

Moreover, if we had any doubt concerning our conclusion that confusion is likely, we would be obligated to resolve such doubt in favor of the registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The opposition is sustained and registration to applicant is refused.